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No. 89-139

In The

Supreme Court of the United States

October Term, 1989

ELWIN F. HOLMES,

Petitioner,

v.

FRANCES SUE P. HOLMES,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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Respondent, Frances Sue P. Holmes, respectfully asks that the Petition for a Writ of Certiorari sought by Petitioner to review the judgment of the Supreme Court of Virginia entered on April 26, 1989, be denied.

STATEMENT OF THE CASE

Respondent submits the following "additions" to the Statement of the Case prepared by Petitioner. References to the Appendicies to the Petition for a Writ of Certiorari are cited herein as "App., p. ___a."

The parties in this cause were married for nearly 40 years, and had raised four children when they separated through no fault of the wife. During two years of litigation through the *pendente lite* support hearing, the trial on the issue of the grounds of the divorce of the parties, hearings on motions to adjust the temporary support, and in the equitable distribution trial, Petitioner, by his own testimony, and by affidavits and other written pleadings filed in the case, maintained that his monthly disposable retirement income was approximately $1,042, which was the basis of the trial court's decision.

The following is but a partial list of the Petitioner's representations made in the record as to his "disposable," non-disability military retirement income made during the course of the litigation:

1. May 15, 1983, answers to interrogatories: "1981 gross Disposable Retirement Income was $11,165.40; 1982 gross Disposable Retirement Income was $12,020.60." Va. Ct. App., App. p.4 (Court of Appeals of Virginia Joint Appendix).

2. June 7, 1983, Petitioner's financial affidavit filed in opposition to *pendente lite* support: "Disposable Retirement Pay . . . $1,062.00 (monthly)." Va. Ct. App., App., p.9.

3. June 13, 1983, *pendente lite hearing*, Elwin F. Holmes' testimony.

   Q. What is your percentage disability?

   A. 70 percent. So therefore 30 percent of my gross Air Force pay is disposable.

4. May 17, 1984, Petitioner's memorandum of authorities: "That your Complainant's [Elwin Holmes] disposable retirement payment is $1,042.00 per month. . . ." Va. Ct. App., App. p.27.

5. May 17, 1984, trial testimony, Elwin Holmes:

   Q. What is your non-disability or disposable income?

   A. My disposable income is $1,042 a month. (Transcript, p.47).

7. May 17, 1984, trial, oral argument, counsel for Elwin Holmes: "[H]e has a distributable income of $1,042 a month. . . ." (Va. Ct. App., App. p.153).

Almost a year after the trial court had written its extensive March 25, 1985 opinion (App., pp.42a-62a) resolving the issues of equitable distribution, the final amount of spousal support, and all outstanding issues in the case, and after the Petitioner had filed and argued exceptions to the trial court's opinion, the Petitioner raised, for the first time, objections to the basis upon which the trial court had determined his "disposable income," claiming that he had been mistaken in his earlier testimony and exhibits. He then petitioned the court to rehear the case with respect to the proper amount of his disposable income. When the trial court denied the Petitioner husband's petition for rehearing, the case had been pending for over three years. As the trial court stated in its letter opinion of December 17, 1985 (App., p.30a):

> In view of the fact that the complainant introduced evidence, made representations and advanced a theory with respect to his disposable retirement pay, and that opinion was written accepting these and was based on them in this regard the Court will not reconsider its prior opinion *or admit additional evidence on the matter.* For the sake of finality, expeditious disposition of cases and due regard for an opposing party

> the other party cannot await an opinion based on his evidence and theory of an issue and then because he is disappointed in the results obtained seek a re-hearing in order to change his theory and evidence, hopefully to achieve a different result. (Emphasis added).

REASON FOR DENYING THE WRIT

Adequate and independent state grounds support the decision of the Virginia Court of Appeals and Supreme Court.

The Supreme Court of the United States will not review a decision of a state court which rests upon adequate and independent non-federal grounds. *Bell* v. *Maryland*, 378 U.S. 226, 237, 12 L.Ed.2d 822, 84 S.Ct. 1814 (1963). *See, Colorado* v. *Nunez*, 465 U.S. 324, 79 L.Ed. 2d, 238, 104 S.Ct. 1257 (1984)(writ of certiorari dismissed as improvidently granted where judgment rested on independent and adequate state grounds). Where adequate state grounds exist, this rule is applied by the Supreme Court no matter what the Supreme Court may say about the merits of the federal issue. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566, 53 L.Ed.2d 965, 97 S.Ct. 2849 (1977).

In the Court of Appeals of Virginia, the Petitioner husband contended that the trial court erred in failing to grant his petition for a rehearing. However, the Court of Appeals of Virginia ruled that:

> We do not agree, however, that the trial judge abused his discretion in dismissing the petition [for a rehearing].

> After a court has concluded an evidentiary hearing "during which each party has ample opportunity to present evidence, it [is] within the court's discretion to refuse to take further evidence on this subject." . . . Although the trial judge's letter ruling did not specifically address the issue whether there was an error on the face of the record, its ruling implies a finding that there was no such error. We agree. App. at pp.9a-10a.

As noted by the Virginia Court of Appeals decision interpreting Virginia procedural rules (App. 11a):

> The trial judge's ruling did not constitute any error on the face of the record, because 10 U.S.C. § 1401 merely provides the basis upon which to calculate the total retirement pay, and does not designate the amounts of pay allotted to disability pay versus non-disability pay. . . .
>
> Moreover, since the husband's second proposed method of computation was available at the beginning of the proceedings, *he has no ground upon which to contend that he should have been granted a rehearing on the basis of after-discovered evidence*. . . .Furthermore, the judge derived his finding concerning disposable retirement income from the husband's testimony and affidavit that his disposable retirement income was in fact $1,042 per month.

Findings of fact found by the lower court and adopted by the highest court of a state, when supported by competent testimony, will not ordinarily be re-examined in the Supreme Court on writ of error to a state court. *Portland R.L. & P. Co.* v. *Railroad Commission*, 229 U.S. 397, 411-412, 57 L.Ed. 1248, 33 S.Ct. 820 (1913). The state court correctly applied the law that only the disposable, non-disability pay was divisible in accordance

with *Mansell* v. *Mansell*, ___U.S.___ (No. 87-201, May 30, 1989). The amount of Colonel Holmes' disposable pay was an issue of fact, not of the law, as determined by the evidence admitted by the trial court. *See*, trial court opinion, App. p.48a: "The conclusion then is that Elwin's military disability benefits must be excluded from the marital property of the parties and must not be used to give an indirect effect in the equitable distribution of that property."

Trial courts in Virginia apply a rule of evidence common to many courts in the United States:

> No litigant can successfully ask a court or jury to believe that he has not told the truth. His statements of facts and the necessary inferences therefrom are binding upon him. He cannot be heard to ask that his case be made stronger than he makes it, where, as here, it depends upon the facts within his own knowledge and as to which he has testified. *Massie* v. *Firmstone*, 134 Va. 450, 462, 114 S.E. 652, 656 (1922).

It is well settled that states have the power to prescribe and apply rules of evidence and rules of procedure so long as they do not violate constitutional requirements or deprive any person of his constitutional rights. A hearing before judgment with full opportunity to present all of the evidence and arguments, which a party deems important, is all that can be adjudged vital under the guaranty of due process of law. Findings by the trial court made in connection with "what in effect was a motion for a new trial on newly discovered evidence must remain undisturbed except for most extraordinary circumstances." *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 358, 9 L.Ed.2d 357, 83 S.Ct. 448 (1963).

In the Commonwealth of Virginia, the procedures by which a court may review its decision following their pronouncement is a creature of both statutory law and *stare decisis*. *Virginia Code* § 8.01-623 specifies the time within which a bill of review is to be filed, and *Va. Code Anno.* § 8.01-680 provides that:

> . . . [W]hen a case is decided by a court without the intervention of a jury, and a party objects to the decision on the ground that it is contrary to the evidence, the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it.

The Petitioner argues in this case that there was no evidence to support the trial court's ruling, because the evidence on which the trial court rendered its decision was erroneous. However, the Petitioner overlooks the fact that the record upon the trial court made its decision was based upon the determination of Petitioner's disposable retirement income as represented to the court repeatedly by the Petitioner himself. Perpetuation of that error of fact by the Petitioner, if error it was, was done on numerous occasions, both by the Petitioner and his counsel. The issue is really whether the trial court abused its discretion in refusing to allow the Petitioner to reopen his case almost a year after the trial court had finally made its decision and heard argument on exceptions by Petitioner to that opinion. The Court of Appeals of Virginia considered this question and ruled upon it based upon well established principles of Virginia law, and, therefore, an adequate and independent state ground clearly supports the state court's decision in this case.

CONCLUSION

The petition for a writ of certiorari should be denied because the action of the Court of Appeals of Virginia and the Supreme Court of Virginia in affirming the trial court was entirely proper. The decision as to whether to reopen the case at the conclusion of the evidence after a lapse of nearly a year after the trial court has rendered its written opinion was solely within the trial court's discretion. The Court of Appeals of Virginia has reviewed the trial court's exercise of that discretion under the procedural rules applied in the Commonwealth of Virginia, and has decided that the trial court did not abuse its discretion, or incorrectly apply Virginia law, and that decision should not be reviewed by this court.

Respectfully submitted,

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